Supreme Court, U. S.
FILED
DEC 27 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1868

NATIONAL GEOGRAPHIC SOCIETY,
Appellant,

vs.

BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal from the Supreme Court of California

Brief of Appellee

EVELLE J. YOUNGER
Attorney General
ERNEST P. GOODMAN,
Assistant Attorney General
PHILIP M. PLANT
Deputy Attorney General
6000 State Building
San Francisco, California 94102
(415) 557-2878
Attorneys for Appellee

SORG PRINTING COMPANY OF CALIFORNIA, 546 FIRST STREET, SAN FRANCISCO 94105

INDEX

Page

Questions Presented 1

Statement of Facts 2

Summary of Argument 4

Argument 6

I. The Use Tax Collection Liability in Question Was Imposed in Conformance with California Law 6

II. The California Activities of the Society Satisfy the Requirements of the Due Process Clause and Commerce Clause 9

A. The Society's California Activities Support the Constitutional Imposition of the Challenged Use Tax Collection Liability, Regardless of Whether or Not These Activities Were Related to the Transactions Taxed 9

1. The Due Process Clause and Commerce Clause Tests Have Never Been Described by This Court as Requiring a Relationship Between the Local Activity and the Transaction Taxed 9

2. The National Bellas Hess Case Does Not Require a Relationship Between the Local Activity and the Transaction Taxed 11

3. The Sears Roebuck and Montgomery Ward Cases Hold That No Relationship Need Exist Between the Local Activity and the Transaction Taxed 16

Page

4. The "Dissociation" Test Applicable in Measuring the Validity of Excise Taxes the Incidence of Which Falls Upon Foreign Retailers Is Inapposite to the Resolution of the Instant Controversy 17

5. The Decision of This Court in *Miller Bros. v. Maryland*, 347 U.S. 340 (1954) Is Inapposite to the Resolution of the Instant Controversy 20

B. In Any Event, the Society's California Activities Are Not Unrelated to the Transaction Taxed 23

III. The Other Contentions Advanced by the Society Are Without Merit 27

Conclusion 31

APPENDIX TO THE BRIEF

APPENDIX A: California Statutes Involved

TABLE OF AUTHORITIES

Cases Pages

American Oil Co. v. Neill, 380 U.S. 451 (1965) 5, 17, 20, 22

Bank of America v. St. Bd. of Equal., 209 Cal. App. 2d 780 (1962) 7, 17

Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 293 F.2d 502 (1956) 13

Felt & Tarrant Mfg. Co. v. Gallagher, 306 U.S. 62 (1939) 26

General Trading Co. v. Tax. Comm'n., 322 U.S. 335 (1944) 20, 26

Henneford v. Silas Mason Co., 300 U.S. 577 (1936) 8

International Shoe Co. v. Washington, 326 U.S. 310 (1945) 13

McFarland v. Campbell, 213 F.2d 855 (1954) 25

McGee v. International Life Ins. Co., 355 U.S. 120 (1957) 13

McLeod v. Dilworth Co., 322 U.S. 327 (1944).....19, 20

Miller Bros. v. Maryland, 347 U.S. 340 (1954) 5, 20, 21, 22, 23

Montgomery Ward & Co. v. Board of Equalization, 272 Cal. App. 2d 728 (1969) 23

National Bellas Hess Co. v. Dept. Revenue, 386 U.S. 753 (1967) .....passim

Nelson v. Sears, Roebuck & Co., 312 U.S. 359 (1941)..passim

Nelson v. Montgomery Ward, 312 U.S. 373 (1941) 5, 12, 16, 17

Norton Co. v. Dept. of Revenue, 340 U.S. 534 (1951) 5, 17, 18, 19

Pages

Reader's Digest Association v. Mahin, 255 N.E.2d 458 (1970), cert.den. 399 U.S. 919 ..... 30, 31

Scripto v. Carson, 362 U.S. 207 (1960) 15, 20, 22

Standard Steel Co. v. Washington Revenue Dept., 419 U.S. 560 (1975) 28

Wisconsin v. J. C. Penny Co., 311 U.S. 435 (1940) 4, 10, 13

OTHER AUTHORITIES

California Use Tax, 24 Cal. L. Rev., 175 8

20 Case Western Reserve Law Review 597 ..... 13, 14

81 Harvard L. Rev. 69 17

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1868

NATIONAL GEOGRAPHIC SOCIETY,
Appellant,

vs.

BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal from the Supreme Court of California

Brief of Appellee

OPINION BELOW

The opinion of the Supreme Court of California is reported in the official reports at 16 Cal.3d 637 and in the unofficial reports at 128 Cal. Rptr. 682 and 547 P. 2d 458.

QUESTION PRESENTED[1]

Whether the National Geographic Society's activities in the State of California provided sufficient nexus as required by the Due Process Clause and Commerce Clause to support

1. The four questions posed by the National Geographic Society (Brief of Appellant, pages 5-6) are so phrased as to constitute premature legal argument.

the imposition of a California use tax collection liability measured by its sales prices on mail order sales of maps, atlases, globes and books to California residents.

STATEMENT OF FACTS[2]

The National Geographic Society (hereinafter "the Society") is a District of Columbia Corporation publishing a monthly magazine known as The National Geographic Magazine (hereinafter "the Magazine"). (A 41-42[3]). The Society also sells maps, atlases, globes and books. (A 42). The stated objective of the Society is "the increase and diffusion of geographic knowledge," and the scientific and educational information it obtains is made available to its members and subscribers both through the Magazine and through its offerings of maps, atlases, globes and books. (A 42).

At all times relevant hereto, the Society was physically present within the State of California insofar as it had voluntarily entered and established two employee-staffed offices—one in San Francisco and the other in Beverly Hills. (A 43). These offices were originally staffed with one salesman and one secretary each, but both offices have since doubled their personnel. (A 43). The basic function of these offices was to solicit advertising for the Magazine. (A 44). However, during the nine month period from August 1, 1963, to and including May 6, 1964, the Society also used these offices to make over-the-counter sales of its maps, atlases, globes and books to Californians. (A 43-44). While these sales were modest in volume ($2,841.05), they nevertheless represented retail sales of tangible personal property within California which were not in the nature of occasional sales. *Id.*[4]

2. This action was tried upon stipulated facts, no evidence having been presented during the trial of this matter.

3. All references to the Appendix on file with this Court shall be designated "A" followed by the page number.

The Society paid sales taxes to the Board of Equalization of the State of California (hereinafter "the Board") measured by its over-the-counter California sales receipts and does not contest the correctness of its liability in this regard. (A 44).

During the overlapping period from April 1, 1964, to September 30, 1964, the Society also sold its maps, atlases, globes and books by mail from its District of Columbia offices to Californians in the aggregate sum of $83,596.18. (A 44). The Society advertised offerings of these items in the Magazine and by announcements mailed to all members and subscribers. *Id.* Forms or coupons were attached to these advertisements for use in placing orders with the Society. *Id.* These offerings were also in the Magazine subscribed to by some 20,000 schools, libraries, bookdealers and corporations, and anyone with access to the Magazine could remove the order coupon and purchase these articles from the Society. (A 42, 44). These orders were mailed to the Society's District of Columbia offices and filled by postal deliveries of the merchandise to the purchaser from the Society's District of Columbia and Maryland offices. (A 44).

4. At page 6 of Brief for Appellant, it is improperly stated as fact:

> "The Society is not registered to do business in the State of California and does not engage in activities in the State of California which would require the Society to register."

There is nothing in the record before this Court to the effect that the Society was not registered to do business in California save and except the assertions of the Society which are not included within the stipulated facts nor otherwise a part of the evidence presented herein. Moreover, the Society's over-the-counter sales, above described, clearly contradict the assertion that the Society did not engage in activities within the State of California which would require registration.

Payment was either on a cash with order basis or a later billing basis. *Id.*

The Board assessed a use tax collection liability against the Society, measured by the sales prices on these mail order sales to California residents. (A 45). The Society paid the assessment under protest and commenced the instant action for refund. *Id.*

SUMMARY OF ARGUMENT

The California use tax collection liability here imposed with regard to the Society's mail order sales of maps, atlases, globes and books to California residents arises under California Revenue and Taxation Code section 6203 which requires, for purposes here relevant, that foreign retailers maintaining offices in California collect the use tax. This requirement does not penalize the foreign retailers; on the contrary, it merely subjects them to a tax equal to the California sales tax borne by local retailers thereby promoting competitive parity.

Under the decisions of this Court, the Society's California activities are not required to bear a direct relationship to the mail order sales constituting the measure of the disputed use tax collection liability. The Due Process Clause and Commerce Clause tests described by this Court do not impose such a relational requirement but rather look to whether the State has given anything for which it can ask return. *Wisconsin v. J. C. Penny Co.*, 311 U.S. 435, 444 (1940). The Society's maintenance of the California advertising soliciting offices satisfies this test.

The decision of this Court in *National Bellas Hess v. Department of Revenue*, 386 U.S. 753 (1967), does not set forth a requirement that a relationship exist between the local activity and the transaction taxed. The lack of nexus

condemned in that case could be cured without imposing such a relational requirement. The *National Bellas Hess* Court invalidated the tax based upon the total absence of any local activities other than the use of common carrier and the U. S. mail. This defect is cured by requiring that the foreign retailer have additional physical presence in the taxing jurisdiction; to further require that that physical presence be interrelated with the transaction taxed would be illogical and unnecessarily restrictive of the state's taxing power.

The Court in *Nelson v. Sears, Roebuck & Co.*, 312 U. S. 359 (1941) and *Nelson v. Montgomery Ward*, 312 U. S. 373 (1941), in upholding the constitutionality of requiring mail order retailers with separate retail outlets within the taxing jurisdiction to collect use taxes, held that the absence of a relationship between a foreign retailer's local activities and the transaction taxed was immaterial.

The "dissociation" test set out in *American Oil Co. v. Neill*, 380 U.S. 451 (1965) and *Norton Co. v. Department of Revenue*, 340 U.S. 534 (1951), requires that a relationship exist between the transaction taxed and the taxing jurisdiction in those instances where the legal incidence of the tax imposed falls on the foreign retailers. As the instant case involves a use tax collection requirement, the legal incidence of which falls upon the California user, the "dissociation" test is inapplicable because the relationship between the taxable transaction (the local use) and the taxing jurisdiction is self evident.

The decision of *Miller Bros. v. Maryland*, 347 U.S. 340 (1954) is inapposite to the resolution of the instant controversy. It turned upon a defect in the relationship between the foreign retailer and the transaction taxed. Residents of the taxing jurisdiction purchased items over

the counter from border stores in foreign states. The Court struck down the use tax collection liability on those sales because it was uncertain whether the purchasers actually returned to the taxing jurisdiction to use the items purchased. No such defect is present in the instant case.

Finally, even if a relationship between the Society's local activities and the transaction taxed were required, it could be found on the facts of this case.

First of all, the Society sold over-the-counter merchandise in California which was identical to that sold by mail order during a portion of the period here in controversy, thus putting this case on all fours with the *Sears Roebuck* case.

Secondly, the Society solicited advertising in California which supported the Magazine: the basic vehicle whereby the Society advertised its mail order sales and the source of its mail order mailing list. Moreover, the prestige of the Society, largely established by the Magazine, enhanced the saleability of the mail order maps, atlases, globes and books. Finally, both the Society's California activities and its mail order sales enhanced its basic corporate purpose of increasing and diffusing geographic knowledge.

ARGUMENT

I. The Use Tax Collection Liability in Question Was Imposed in Conformance with California Law.

We are here concerned with the California use tax which is complemental to the California sales tax or tangible personal property. See Sections 6051, 6203 and 6401 of the Revenue and Taxation Code.[5] Section 6203 requires every "retailer engaged in business in this state and making sales

5. All references to statutory sections hereinafter made shall be to the California Revenue and Taxation Code unless expressly noted otherwise.

of tangible personal property for storage, use or other consumption in this state" to collect use taxes from the purchaser. Section 6204 provides that the retailer is indebted to the state for any taxes which it is required to collect. The retailer becomes so indebted regardless of whether or not the use tax is collected. If the use tax is not collected, the retailer is liable for default in the performance of its duty as a collection agent for the state. *Bank of America v. State Bd. of Equal.*, 209 Cal.App. 2d 780, 793; 26 Cal.Rptr. 348, 355 (1962).

The Society's activities in California bring it within the coverage of section 6203 and therefore place it under a duty to collect use taxes upon the sales in question. Section 6203 expressly provides that the phrase "retailer engaged in business in this state" as used therein includes (among other descriptions not relevant to the instant controversy) "[a]ny retailer maintaining, occupying or using, permanently or temporarily, directly or indirectly, or through a subsidiary, or agent, by whatever name called, an office, place of distribution, sales or sample room or place, warehouse or storage place or other place of business". The maintenance by the Society of two offices within California therefore establishes it to be such a "retailer engaged in business in this state". The California Supreme Court, in upholding the use tax collection liability below, plainly so held. 16 Cal.3d 637, 642; 547 P.2d 458, 460-461.

Moreover, the imposition of a use tax collection liability measured by the Society's total sales to Californians best fulfills the purposes of the use tax law as well. The basic purpose of the use tax law is to provide for competitive parity by charging foreign retailers doing business in California with a use tax collection liability equivalent to the sales tax paid by competing local retailers.

A more complete description of this purpose is detailed in an article entitled *the California Use Tax,* 24 Cal. L. Rev. 175, by Roger Traynor, former Chief Justice of the California Supreme Court. It is initially observed therein that the operation of a local sales tax without a complemental use tax penalizes local retailers by permitting foreign competitors to undercut their prices by selling ex tax. The author therefore preliminarily concludes:

> "If the state sales taxation is to continue, states must find some way of equalizing the competition which now threatens their sources of revenue as it threatens their local businesses." *Id.* at 175.

This equalization is found in the complemental use tax law; however, the use tax alone could not equalize the competition because:

> "Any attempt to collect a use tax from countless individual users of commodities would involve so much supervision and expense as to vitiate the exercise of a state's jurisdiction over them. The users might have a clear responsibility for tax payment, but they might evade it by virtue of their numbers." *Id.* at 181.

Accordingly, the use tax collection liability is necessary.

This Court has recognized the validity of this purpose in *Henneford v. Silas Mason Co.,* 300 U.S. 577 (1936), wherein it said of the Washington use tax law:

> "The practical effect of a system thus conditioned is readily perceived. *One of its effects must be that retail sellers in Washington will be helped to compete upon terms of equality with retail dealers in other states* who are exempt from a sales tax or any corresponding burden. Another effect, or at least another tendency, must be to avoid the likelihood of drain upon the revenue of the state, buyers being no longer tempted to place their orders in other states in the effort to escape payment of the tax on local sales." (Emphasis added.) *Id.* at 581.

For purposes of the instant action, the Society is such a foreign retailer[6] who, absent the imposition of a use tax collection liability, would enjoy a competitive advantage over local retailers by being able to offer lower prices selling ex tax. Imposition of this liability thus comports with the spirit, as well as the letter, of the California use tax law.

II. The California Activities of the Society Satisfy the Requirements of the Due Process Clause and Commerce Clause.

A. THE SOCIETY'S CALIFORNIA ACTIVITIES SUPPORT THE CONSTITUTIONAL IMPOSITION OF THE CHALLENGED USE TAX COLLECTION LIABILITY, REGARDLESS OF WHETHER OR NOT THESE ACTIVITIES WERE RELATED TO THE TRANSACTIONS TAXED.

1. The Due Process Clause and Commerce Clause Tests Have Never Been Described by This Court as Requiring a Relationship Between the Local Activity and the Transaction Taxed.

The Due Process Clause and the Commerce Clause are closely related insofar as similar standards have been applied by the courts to determine whether state tax laws are constitutional thereunder. *National Bellas Hess v. Dept. of Revenue, supra,* 386 U.S. 753, 756 (1967). These standards are incorporated into a test of nexus or minimum contact between the taxpayer and the taxing jurisdiction which is necessary to support a finding that the tax is constitutionally imposed. Although the test has been variously

---

6. The Society's character as a non profit, scientific and educational organization, however commendable, is here irrelevant because this case will stand as precedent governing the treatment accorded all out-of-state retailers similarly situated, whether or not they possess the non profit character of the Society. They will, in the main, be comprised of profit making retailers eager to escape the requirement of collecting use taxes in order to gain a competitive pricing advantage over local retailers.

stated, an oft quoted definition of what constitutes nexus is set forth in *Wisconsin v. J. C. Penny Co., supra,* 311 U.S. 435, 444 (1940), wherein this Court noted:

> "That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return." *Id.* at 444.

This definition does not engraft the requirement of a relationship between the local contact and the transaction taxed. The requisite "fiscal relation" is established by the fact that the foreign retailer has entered the state and benefitted as a result. In the instant case, for example, it can be readily seen that the Society has secured substantial benefits from its activities within California over and above those associated with its mail order business. By virtue of the protection conferred by this State, the Society has been able to establish and maintain employee staffed offices in San Francisco and Beverly Hills from which to solicit advertising revenues for the Magazine. In this regard it is noteworthy that the Society has since doubled its salesmen and secretaries in both California offices. Further, the very opportunity of having a market of potential advertisers in California from whom to solicit business is a benefit conferred by the state insofar as its laws protects them and permits their continued existence. The net result of these activities is obviously beneficial insofar as it provides the Society with advertising dollars from California businesses.

Certainly the above benefits justify requiring the Society to collect a use tax on its mail order sales to Californians whether or not a relationship exists between the local activity and the transaction taxed. It is asking the Society no more than to bear a fair share of the cost of local government.

2. The National Bellas Hess Case Does Not Require a Relationship Between the Local Activity and the Transaction Taxed.

This Court in *National Bellas Hess v. Department of Revenue, supra,* 386 U.S. 753 (1967) held that a use tax collection liability could not be imposed upon an out-of-state mail order retailer whose only contracts with the taxing jurisdiction were through the use of common carriers or the U.S. mail. In so holding, the Court noted that to conclude otherwise would be to:

> ". . . repudiate totally the sharp distinction which these and other decisions have drawn between mail order sellers with retail outlets, solicitors, or *property within a State,* and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business." (Emphasis added.) 386 U.S. 753, 758.

It is evident from the above quoted material that a mail order seller with property within a state would be subject to taxation upon its mail order sales to the residents of that state. The Society's maintenance of two offices in this state easily qualifies it as a seller with property in California. The Court did not set out a requirement that the property owned bear any relationship to the transaction taxed. On the contrary, the overall import of the *National Bellas Hess* case is that where there is exploitation of the local market by mail order sales, any physical contacts between the retailer and the taxing jurisdiction above and beyond contact "by common carrier or the United States mail" would support the imposition of a use tax collection liability measured by the mail order sales.

The Society contends that under the rule of *National Bellas Hess,* a foreign retailer must have independent in-state contacts with the *customers* of the mail order sales before he can constitutionally be required to collect a use tax with regard thereto. Brief for Appellant, p. 28. The only language in the opinion which the Society cites in support of this contention is the sentence quoted at page 28 of the Brief for Appellant wherein the Court noted that it has never upheld the imposition of a use tax collection liability on a retailer "whose only connection with customers" in the taxing jurisdiction is by common carrier or the United States mail. 386 U.S. at 758. To construe this sentence in the manner urged by the Society would be to render the opinion internally inconsistent; moreover, it would impute to the *National Bellas Hess* court the intent to overrule *sub silentio Nelson v. Sears Roebuck & Co.* (1941), 312 U.S. 359, and *Nelson v. Montgomery Ward and Co.* (1941), 312 U.S. 373, despite the fact that it earlier cites both cases with apparent approval. 386 U.S. at 757.

The opinion, as so construed, would be rendered internally inconsistent because such a relational requirement would not square with the Court's recognition, earlier noted, that mere ownership of property within the taxing jurisdiction without more would support the imposition of a use tax collection liability. The opinion, as so construed, would overrule *Sears Roebuck* and *Montgomery Ward* because these cases held, as will be discussed in more detail *infra,* that the absence of a relationship between the foreign retailer's local activities and the mail order business taxed was irrelevant.

In addition to the foregoing, it is plain upon a review of the basis of the Court's holding in the *National Bellas Hess* case that the constitutional defects it condemned could be

cured without requiring that a relationship exist between the retailer's local activities and the transaction taxed. As noted above, the Court in *National Bellas Hess* considered objections raised under both the Due Process Clause and the Commerce Clause. These two sources of objection will be discussed separately in this regard.

The Due Process Clause requires that some benefit be conferred by the taxing jurisdiction for which a return could be asked. *Wisconsin v. J. C. Penny Co., supra,* 311 U.S. 435, 444 (1940). On the facts of the *National Bellas Hess* case, it is clear that the foreign retailer benefitted insofar as it had customers in the taxing jurisdiction whose continued existence was dependent upon the protection afforded them by that state. Therefore, if the Court had held due process requirements satisfied under those facts, the decision would have been logically consistent with the fairness requirements underlying concept of due process. Indeed, in the related area of in personam jurisdiction over foreign entities, the Court did so hold. In *McGee v. International Life Ins. Co.,* 355 U.S. 120 (1957), in personam jurisdiction was upheld upon the basis of a commercial exploitation of the forum state despite the absence of an physical presence therein by the foreign corporation sued. This state of affairs has prompted at least one commentator to speculate that "[i]n light of the striking similarity between jurisdiction for the purpose of taxation and jurisdiction for the purpose of exercising judicial power,[7] the court in *Bellas Hess* could easily have adopted the economic exploitation test in lieu

7. The author noted that the due process tests in the areas of taxation and in personam jurisdiction are very similar, citing *Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc.,* 239 F.2d 502 (4th Cir. 1956) and *International Shoe Co. v. Washington,* 326 U.S. 310, 321 (1945). 20 Case Western Reserve Law Review 597, 605-606, fn. 42.

of the archaic and artificial standard demanding physical nexus." 20 Case Western Reserve Law Review 597, 605-606, fn. 42. While the Court in *National Bellas Hess* indicated the need for a physical presence over and above this mail order economic exploitation, it would be unduly restrictive to the state's taxing power to further require that it be related to any particular transaction. It should be enough that the foreign retailer receives some form of protection, opportunity or benefits, independent of the mail order exploitation, for which the state can ask return. As noted previously, the Society has so benefitted from its California activities.

With regard to the Commerce Clause, the opinion of the Court in *National Bellas Hess* turned upon the administrative entanglements which the majority felt would unduly burden interstate mail order businesses if every state, municipality, school district and other political subdivisions were allowed to impose sales and use taxes at varying rates with varying administrative and record keeping requirements. 386 U.S. 753, 759-760. In keeping with the above, it is unnecessary to construe *National Bellas Hess* as requiring that a retailer's local activities be related to the taxable transaction. All that is needed to cure the defect found in that case is the requirement of a voluntary physical presence, independent of mail order sales, as a condition precedent to taxability. Thus, permitting use tax collection liabilities to be imposed with regard to mail order sales of foreign retailers who have voluntarily entered the taxing jurisdiction and established a business office will not result in the administrative entanglement condemned in *National Bellas Hess*. The number of taxing jurisdictions in which the typical mail order retailer has business offices

will doubtless be small;[8] moreover, the mail order retailer would be able to control his susceptability to such taxation by choosing selectively where he would maintain such offices.

It is appropriate to mention at this point that all of the bills recently introduced in Congress which relate to the imposition of a jurisdictional standard for state sales and use taxation of interstate commerce provide that a person may constitutionally be subjected to a use tax collection liability if that person owns or leases real property within the state without limitation as to whether said ownership or leasing was related to the transaction taxed.[9] This is especially noteworthy in light of the fact that most of these bills proposed general cutbacks in the power of the states to impose use tax collection liabilities upon foreign retailers under other circumstances such as those held taxable in *Scripto v. Carson,* 362 U.S. 207 (1961), thus reflecting the belief that, at least with regard to leasing or ownership of property, a foreign retailer's local activities within the taxing jurisdiction clearly subject it to tax despite the lack of any relationship to the transaction taxed. Because, as noted in *National Bellas Hess,* the Congress is vested with the power of regulation and control under the Commerce Clause. (386 U.S. 753, 760), this belief upon the part of all its members introducing such bills is significant.

---

8. Indeed, Amicus Curiae Direct Mail/Marketing Association, Inc., whose only argument not advanced by the Society is that administrative entanglements would result from an affirmance herein, concedes that "[t]he overwhelming majority [of firms engaged in interstate commerce] have places of business in only one state." Brief Amicus Curiae on Behalf of Direct Mail/Marketing Association, Inc. Urging Reversal, page 3.

9. 89th Congress: H.R. 11798, H.R. 16491; 90th Congress: H.R. 2158; 91st Congress: H.R. 2179, H.R. 3835, H.R. 4178, H.R. 7906, S. 611, S. 916, S. 2804; 92d Congress: H.R. 1538, H.R. 4267, S. 317, S. 1210; 93d Congress: H.R. 977, H.R. 1453, S. 282, S. 1245, S. 1982, S. 2811; 94th Congress: H.R. 9, S. 28.

3. The Sears Roebuck and Montgomery Ward Cases Hold That No Relationship Need Exist Between the Local Activity and the Transaction Taxed.

In *Nelson v. Sears, Roebuck & Co., supra,* 312 U.S. 359 (1940), this Court upheld the imposition of an Iowa use tax collection liability measured by mail order sales of an out-of-state retailer with Iowa retail outlets. The retailer there advanced the argument that the disputed mail order sales were unrelated to the presence of its retail outlets in Iowa. The use tax collection liability was upheld despite this argument. The Court noted that Iowa, by virtue of the retailer's contacts with it, was entitled to tax the retailer's entire Iowa business. Thus, it noted:

> "Whatever may be the inspiration for these mail orders, however they may be filled, Iowa may rightly assume that they are not unrelated to respondent's course of business in Iowa. They are nonetheless a part of that business though none of respondent's agents in Iowa actually solicited or placed them. Hence to include them in the global amount of benefits which respondent is receiving from Iowa business is to conform to business facts." 312 U.S. 359, 364.

The clear implication of the court's observations in this regard is that a direct relationship between the retailer's local activities and the mail order sales constituting the measure of the use tax collection liability need not be proven.[10] Moreover, this of necessity had to be so, for otherwise the Court could not have upheld the use tax collection liability without observing that there had been satis-

10. The Society suggests that the court's decision turned upon its finding of a factual inter-relationship between the local retail outlets and the mail order sales. Brief of Appellant, page 17. The language quoted above that Iowa may "assume" such activities "not unrelated" dispels such a conclusion. Moreover, as noted, *infra,* the Court in *Nelson v. Montgomery Ward, supra,* 312 U.S. 373 (1941) expressly declares irrelevant evidence pointing to the absence of such a relationship.

factory proof of the existence of such a relationship. The mere fact of over-the-counter sales at Sears' retail outlets in Iowa cities cannot realistically be said to constitute proof of a relationship to the catalogue mail order sales to residents of the outlying rural areas of Iowa.

In the related case of *Nelson v. Montgomery Ward, supra,* 312 U.S. 373 (1941), in passing upon the same issue, this Court found testimony relating to the absence of a relationship between the retailer's local activities and the taxable transaction was "immaterial". 312 U.S. at 375. The *Montgomery Ward* case has accordingly been cited in support of the proposition that the local activities of a foreign retailer need not have a causal relation to the sales in which the tax is levied. 81 Harvard L. Rev. 69, 215, fn. 14.

4. The "Dissociation" Test Applicable in Measuring the Validity of Excise Taxes the Incidence of Which Falls Upon Foreign Retailers Is Inapposite to the Resolution of the Instant Controversy.

The Society alludes repeatedly in its brief to the "dissociation" test set forth in *American Oil Co. v. Neill, supra,* 380 U.S. 451 (1964) and *Norton Co. v. Department of Revenue, supra,* 340 U.S. 534 (1951). In relying upon these cases, the Society refuses to come to grips with the fact that the excise taxes there involved fell upon the foreign retailers whereas the use tax involved in the instant case falls upon the local California purchaser. This difference is crucial insofar as different standards of nexus are applied with regard to testing the validity of taxes falling on the foreign retailer.

As touched upon previously, the California use tax has its incidence upon the California purchasers who store, use or consume the products purchased from foreign retailers. See *Bank of America v. State Bd. of Equal., supra,* 209 Cal.App.2d 780, 793 (1962); 26 Cal.Rptr. 348. The

foreign retailer is liable only for his default in the performance of his duty as collection agent of this tax under California Revenue and Taxation Code section 6203. *Id.* at 799.

The significance of the distinction between a use tax collection liability, where the incidence of the tax is on the local purchaser, and liability for an excise tax imposed directly upon the out-of-state retailer itself was recognized by this Court in *Norton Co. v. Dept. of Revenue, supra,* 340 U.S. 534 (1951), where, in passing upon the constitutionality of a gross receipts tax imposed upon a nonresident retailer, it declared inapposite cases involving the collection of taxes attributable to the local buyer observing that a state imposing use taxes can more easily meet the burden of demonstrating sufficient nexus to support the tax because the impact of those taxes is on the local buyer or user. In that regard, the Court said:

> "Where a corporation chooses to stay at home in all respects except to send abroad advertising or drummers to solicit orders which are sent directly to the home office for acceptance, filling, and delivery back to the buyer, it is obvious that the State of the buyer has no local grip on the seller. Unless some local incident occurs sufficient to bring the transaction within its taxing power, the vendor is not taxable. *McLeod v. Dilworth Co.*, 322 U.S. 327. Of course, *a state imposing a sales*[11] *or use tax can more easily meet this burden, because the impact of those taxes is on the local buyer*

11. The reference to a "sales" tax at this point is explained by the fact that some states have sales taxes the incidence of which falls upon the *consumer* rather than the vendor. See State and Local Taxation, John F. Due (1971), pp. 24-26. Illinois (at the time of the *Norton* decision) had a sales tax the incidence of which was on the vendor and therefore the court was holding inapplicable decisions involving consumer type sales taxes and use tax collection liabilities such as are present in this case.

> *or user. Cases involving them are not controlling here, for this tax falls on the vendor.*" (Emphasis added.) 340 U.S. at 537.[12]

This distinction is justified because the local buyer or user has obvious contacts with the taxing jurisdiction, therefore a tax whose incidence falls upon such buyers or users is more easily sustainable. This is a difference in substance and not merely form. In *McLeod v. Dilworth Co.*, 322 U.S. 327 (1944), the Court noted:

> ". . . we are not dealing with matters of nomenclature even though they be matters of nicety. 'The state court could not render valid, by misdescribing it, a tax law which in substance and effect was repugnant to the Federal Constitution, neither can it render unconstitutional a tax, that in its actual effect violates no constitutional provision, by inaccurately defining it.' *Wagner v. City of Covington,* 251 U.S. 95, 102. Though sales and use taxes may secure the same revenues and serve complementary purposes, they are, as we have indicated, taxes on different transactions and for different opportunities afforded by a State." *Id.* at 331.[13]

Perhaps the best illustration of the effect of this distinction is a comparison of the *McLeod* case and *General Trad-*

12. The Society contends that the Court's distinction of use tax collection cases in *Norton* does not signify that the dissociation test is wholly inapplicable to them but rather that it applies in such cases in a different degree. Brief of Appellant, pages 32-33. This is illogical. The dissociation test applies with regard to taxes falling on foreign retailers because its purpose is to determine whether the transaction taxed (the foreign retailers' sales) bears a sufficient relationship to the taxing jurisdiction to bring it within the latter's taxing power. In direct contrast, where use tax collection liabilities are involved, there is no question that the taxable transaction (the local use) is within taxing power of the state in question; therefore the dissociation test would serve no useful function.

13. This observation directly refutes the Society's assertion that there is no distinction between taxes the incidence of which fall on the foreign retailer and use tax collection liabilities because "[t]he impact of a sales tax, an excise tax, or a use tax, is identical." Brief of Appellant, page 31.

ing Co. v. Tax Comm'n, 322 U.S. 335 (1944). These two cases were argued and decided on the same dates and presented virtually identical facts save and except that *McLeod* involved a sales tax upon an out-of-state retailer and *General Trading Co.* involved a use tax collection liability imposed upon an out-of-state retailer. In both cases the out-of-state corporations were not qualified to do business in the taxing state and had no office or place of business there but did solicit orders from its residents by travelling salesmen. In the *McLeod* case, the sales tax was held unconstitutional; in the *General Trading Co.* case, the use tax collection liability was upheld. The dissents in both cases make it apparent that the majority reached different results in the two cases solely because of the nature of the tax imposed.

Similarly, *McLeod* also can be contrasted with *Scripto v. Carson,* 362 U.S. 207 (1960), where on comparable facts, the Court upheld the constitutionality of a use tax collection liability imposed upon the nonresident retailer. The facts of these two cases were recognized as indistinguishable in 81 Harv.L.Rev. 69, 216.

Just as the *Norton* case has been shown to be inapplicable to the instant controversy, so is the case of *American Oil Co. v. Neill, supra,* 380 U.S. 451 (1964). In that case, an Idaho State Tax Collector imposed an excise tax on an out-of-state motor fuel dealer. *Id.* at 454, 455. The court expressly adopted the findings of the trial judge that the incidence of the tax was on the dealer not the local user. *Id.* at 456-457.

5. The Decision of This Court in Miller Bros. v. Maryland, 347 U.S. 340 (1954) Is Inapposite to the Resolution of the Instant Controversy.

The Society makes reference to the decision of this Court in *Miller Bros. Co. v. Maryland, supra,* 347 U.S. 340 (1954). As is shown below, the *Miller Bros.* case is not germane to

the question here presented because the Court's finding of insufficient nexus in that case turned upon defects not present in the instant case.

In *Miller Bros. v. Maryland, supra,* 347 U.S. 340 (1954), the Court invalidated a Maryland use tax collection liability imposed with regard to the sales of merchandise by a Delaware corporation from its Delaware store to visting Maryland customers. The merchandise purchased from the Delaware store was either handed to the customer over-the-counter or delivered to the customer's Maryland address by common carrier or the vendor's vehicle. The Court, in holding the Maryland use tax collection requirement unconstitutional, noted that it was uncertain as to whether merchandise sold over-the-counter was actually transported to Maryland prior to use. 347 U.S. 340, 344.

It is clear from the above that the Court's holding in *Miller Bros.* turned upon a defect in the relationship between the foreign retailer and the transaction taxed which is not present in the instant case. This defect was aptly described by the California Supreme Court in this case as follows:

> "The court in denying tax liability noted that no one was liable for a use tax until the merchandise was imported into the taxing state. When there is an over-the-counter out-of-state sale, the taxable event, use occurs only after the sale is complete; the seller has no control over that use. When discussing *Miller Bros.* in *Scripto v. Carson,* supra, 362 U.S. 207, 212 [4 L.Ed. 2d 660, 664-665], the Supreme Court declared that it was impossible for Miller to determine that goods sold for cash to a customer over the counter at its store in Delaware were to be used and enjoyed in Maryland. The use in the taxing state must be certain from the retailer's own actions and not just known to him from other factors. Knowledge is an insufficient connection

to uphold a tax against attack under the due process clause. (*American Oil Co. v. Neill, supra,* 380 U.S. 451, 457 [14 L.Ed 2d 1, 6].)" 16 Cal. 3d 637, 649-650; 128 Cal. Rptr. 682, 690.

In direct contrast, the Society in the instant case shipped all purchases directly to its California customers inside California; hence no uncertainty or gaps intervene between the Society's mail order sales and the California purchaser's subsequent use.

In addition to the foregoing, *Miller Bros.* may be distinguished from the instant case in that as the foreign retailer in that case did not directly exploit the market of the taxing State. Thus, the Court in *Miller Bros.* emphasized that the Delaware based foreign retailer did not engage in solicitation in Maryland, the taxing jurisdiction, "other than the incidental effects of general advertising" in Delaware and that there had been "no invasion or exploitation of the consumer market in Maryland", thereby recognizing the *incidental* nature of the solicitation of the Marylanders there involved. 347 U.S. 340, 347. Stated in another way, the Delaware store did not direct an advertising campaign specificially against the residents of Maryland; rather, its general advertising directed to potential customers in the vicinity of the store spilled over into Maryland as well as reaching residents of Delaware. Further, the purchasers did not deal with the store from their residences but had to leave Maryland and visit the store in Delaware. This situation prompted this Court in *Scripto v. Carson, supra,* 362 U.S. 207 (1960), to characterize the facts of *Miller Bros.* as follows:

> "True, there was an 'occasional' delivery of such purchases by Miller into Maryland, and it did occasionally mail notices of special sales to former customers; but *Marylanders went to Delaware to make purchases—Miller did not go to Maryland for sales.*" (Emphasis added.) 362 U.S. 207, 212.

All of the above described factors, which led the Court in *Miller Bros.* to find that there had been no exploitation of the Maryland market, are absent in the instant case. The Society specifically directed its advertising campaign for the sales of maps, atlases, globes and books against its California subscribers. This solicitation was continuous in the form of repeated advertisements in the Magazine and mailed announcements sent throughout all periods relevant hereto. Finally, the Society did not wait for these California residents to come to its out-of-state stores, but enclosed with the advertisements mail order coupons which were completed and sent directly to the Society. It is clear that under the rationale of the *Miller Bros.* case the Society has exploited the California market.

For all the foregoing reasons, the *Miller Bros.* case is inapposite.[14]

B. IN ANY EVENT, THE SOCIETY'S CALIFORNIA ACTIVITIES ARE NOT UNRELATED TO THE TRANSACTION TAXED.

It has been shown in the preceding section of this brief that the tests of the Due Process Clause and Commerce Clause do not require that there be a relationship between

---

14. The case of *Montgomery Ward & Co. v. Bd. of Equalization,* 272 Cal.App.2d 728 (1969), 78 Cal.Rptr. 373, cert. den. 396 U.S. 1040, cited by Society can be distinguished on the same grounds as *Miller Bros.* insofar as it involved a California use tax collection liability imposed with regard to over-the-counter sales of goods by an out-of-state retailer from its Reno, Nevada and Klamath Falls, Oregon stores to customers with California addresses. As the California Supreme Court below noted, the constitutional defect in the *Montgomery Ward* case "lay in the lack of certainty between the seller's activities and the event to be taxed, namely the use". 16 Cal. 3d 637, 649; 128 Cal.Rptr. 682, 690.

the local activities of a foreign retailer and the transaction taxed. Nevertheless, assuming for the sake of argument that such a relationship were required, it is clear that it is present in the instant case.

This is perhaps made most apparent when the instant case is compared with *Nelson v. Sears Roebuck & Co., supra,* 312 U.S. 359 (1941). The two cases are virtually identical insofar as both involved foreign retailers who sold over-the-counter from local offices items which were identical to those sold by mail order. Thus, if the *Sears Roebuck* case is construed as requiring that the local activities be related to the mail order sales, then it must be concluded that this test was met in the instant case as it was there. The Society argues that its California sales were too insubstantial to parallel the *Sears Roebuck* case. Though the Society's California over-the-counter sales were modest and only effected during a portion of the period in controversy, they nevertheless constituted a course of retail sales of items similar to those sold by mail order which California could rightly assume were "not unrelated." To say that such a conclusion would not conform to practical reality because such a modest level of over-the-counter sales could not appreciably influence mail order sales is no different than to say that *Sears Roebuck* was wrongly decided because the over-the-counter sales from Sears' urban retail outlets obviously did not affect catalogue mail order sales to outlying rural areas of Iowa. As the latter argument apparently proved unpersuasive, the former argument should similarly be cast aside.

Moreover, the Society's other California contacts separate and apart from its local over-the-counter sales bear a stronger relationship to the mail order sales than those before the Court in *Sears Roebuck*. In *Sears Roebuck*, the

existence of the retail outlets in Iowa must be said to contribute to some unknown extent to the generation of mail order sales. In the instant case, the Society's California based employee-staffed offices were related to the mail order sales here in controversy, by virtue of the following facts:

(1) The Society's California solicitation of advertisements from those offices provided revenues which enured to the Magazine;

(2) The Magazine served as the basic vehicle through which the advertisements of the maps, atlases, globes and books in question were communicated to the Society's California customers;

(3) The membership of the National Geographic Society provided the mailing list of California residents to whom the Society sent its flyers;

(4) The prestige and goodwill of the Magazine carried over to products sold under the Society's name.

It is thus submitted that if, indeed, a relationship between the local activities and the transaction taxed was required at all by the *Sears Roebuck* Court, it is satisfied in the instant case as it was in that case.

The Society attempted below to distinguish the holding in *Sears Roebuck* upon the ground that the foreign retailer in that case was qualified to do business within the taxing jurisdiction. In that regard, the Society has gone outside the proven record before this Court and asserted that it was not similarly qualified to do business in California. Brief for Appellant, page 10. This suggestion conflicts with the record insofar it is stipulated that the Society did sell tangible personal property in California at the start of the period in controversy and therefore, pursuant to the presumption that things are lawfully done,[15] it must be pre-

15. *McFarland v. Campbell,* 213 F.2d 855, 858 (1954).

sumed that the Society complied with California Revenue and Taxation Code section 6066 and secured a seller's permit. Moreover, even if it were assumed that the Society did not seek a seller's permit, it shoud nevertheless be estopped to deny the lack of having qualified to do business in California in light of its stipulated admission that it did in fact do business in this state; otherwise, a business violating the law would enjoy an advantage over the law abiding business which had secured a seller's permit.

Furthermore, the result reached in *Sears Roebuck* should not have been otherwise if the retailer in that case had not been registered to do business within that state. Although the Court there speculated hypothetically that the lack of qualification to do business within the taxing jurisdiction might result in an inability to tax occasioned by the impotence of state power, it went on to find that the taxpayer's local activities in the taxing jurisdiction supported taxation of its mail order business. 312 U.S. 359, 364. Thus the Court recognized that the presence or absence of qualification to do business within the taxing jurisdiction was superfluous to the conclusion it reached on the facts before it. Moreover, this Court has easily found sufficient nexus to support the imposition of a use tax collection liability against foreign corporations in other cases before it despite the fact that the corporation was not licensed to do business in the taxing state. *Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U.S. 62 (1939); *General Trading Co. v. Tax Comm'n.*, 322 U.S. 335 (1944). It follows that the Society's arguments in this regard shoud be dismissed as irrelevant.

Finally, a relationship between the Society's California activities and the disputed mail order sales can be said to exist insofar as both activities further the basic objective of the Society: the increase and diffusion of geographic

knowledge. (A 42). As noted in our Motion to Dismiss or Affirm, the California Supreme Court held below that under *Sears Roebuck* it must be established that the Society's activities were not unrelated to the mail order sales constituting the measure of the tax. Moreover, that court declined to consider as unnecessary to its decision the Society's California over-the-counter sales. Nevertheless, it found a sufficient relationship in the fact that both the Magazine, for which the Society solicits advertising in California, and the maps, atlases, globes and books which were sold by mail order are similar in nature and serve the basic corporate purpose described above. 16 Cal. 3d 637, 647; 128 Cal. Rptr. 682, 688. While the Board does not accept the conclusion of the California Supreme Court that such a relationship need be found, it agrees with its conclusion that one exists on the facts of this case.

III. The Other Contentions Advanced by the Society Are Without Merit.

Although it has been shown in the preceding section of this brief that the Society's basic contentions are without merit, certain points raised by the Society in its brief have not previously been touched upon and will be dealt with below.

The Society argues that the imposition of a use tax collection liability upon a foreign retailer cannot be upheld in the absence of an in-state, "sales-related activity". Brief of Appellant, pages 14-20. This argument does not square with the fairness concept underlying the nexus requirement. As discussed earlier, a foreign retailer substantially benefits from the states in which it does a mail order business insofar as the protection afforded by the state insures the continued existence of its customers. While additional con-

tacts have been held necessary, it is neither fair nor logical to further impose a relational requirement between those contacts and the mail order sales. Obviously, a foreign retailer can enjoy the benefit of the protection of local government in the conduct of activities other than sales-related activities as, for example, the Society has in the instant case.

That this Court has not required that the local activity be sales-related is manifest in the recent decision of *Standard Steel Co. v. Wash. Revenue Dept.*, 419 U.S. 560 (1975). The Court there upheld the constitutionality of an unapportioned gross receipts tax imposed upon the mail order sales by a foreign retailer to Boeing. *Id.* at 561. The only local activity was a Washington based engineer whose primary duty was to consult with Boeing regarding its anticipated needs and to follow up on any difficulties in the use of the products after delivery. *Id.* He did not solicit orders or otherwise involve himself in the mail order sales. *Id.* Although this local activity only indirectly resembled a sales-related activity, the Court found that it so strongly supported a finding of nexus that it characterized the taxpayer's contentions to the contrary as verging "on the frivolous." *Id.* at 562.

The Society also raises a false spectre by suggesting that unless this Court require a local sales-related activity as a condition precedent to the state's power to require the collection of use taxes, any contact, be it a one-time photographic expedition or contractual arrangements with a scientist having a California address, would result in taxability. Brief of Appellant, pages 26-27. This, of course, does not follow. To say that the continuous maintenance of employee-staffed business offices in the taxing jurisdiction supports a finding of nexus sufficient to uphold a requirement that use taxes be collected on mail order sales is not to say that any contact with the taxing jurisdiction, however meager or sporadic, would support a similar requirement.[16] On the other hand, if the Court adopts the Society's rigid requirement of a sales-related activity, it would mean that even if the Society had its headquarters offices, printing presses and magazine distribution offices in California, it could nevertheless sell its maps, atlases, globes and books, ex tax from its District of Columbia and Maryland offices. This would be patently unjust.

The Society alludes to the fact that the Magazine is exempt from tax. Brief of Appellant, page 17. This exemption is conferred as a matter of legislative grace under California Revenue and Taxation Code Section 6362 which exempts the gross receipts from the sale or use of periodicals and their components from sales and use taxation and is not germane to the resolution of the instant controversy.[17] Nevertheless, the Society makes reference to this statute thereby suggesting that it somehow compels this Court to disregard its California advertising soliciting activities in passing upon the question of whether sufficient nexus exists to support the disputed use tax collection liability. This suggestion is spurious.

---

16. By way of example, the bills introduced in Congress on this subject itemized in footnote 9, *supra*, would uphold taxation in the former circumstances, but clearly not in the latter.

17. California Revenue and Taxation Code Section 6362 provides in relevant part as follows:

> "(a) There are exempted from the taxes imposed by this part, the gross receipts from the sale of, and the storage, use or other consumption in this state, of tangible personal property which becomes an ingredient or component part of any newspaper or periodical regularly issued at average intervals not exceeding three months and any such newspaper or periodical."

In the first place, the periodical exemption contained in section 6362 does not relate to the Society's California advertising soliciting activities. The statute only addresses itself to the taxability of the sale or use of *tangible personal property*. In contrast, the Society's solicitation of advertising and subsequent sale of advertising space is a *service* as opposed to a transaction in tangible personal property. Therefore, section 6362 does not apply at all.

In the second place, even though the Society's California advertising soliciting activities are not subject to sales or use taxation, this circumstance would be irrelevant to the instant controversy in that it would not affect the determination of whether the Society had received any benefits from its California activities for which California can ask a return under the Federal Due Process and Commerce Clause. The California Supreme Court below noted this when it observed:

> "The existence of a nexus to tax an interstate transaction is a constitutional question. The only relevant considerations are the contacts between the taxing state and the person and event to be taxed. The fact that a state chooses not to tax when it could constitutionally do so does not in any way reduce these contacts with the state. The manner in which the state chooses to exercise the power does not affect the existence of the power." 16 Cal. 3d 637, 645, fn. 7; 128 Cal.Rptr. 682, 687, fn. 7.

This point was also made in *Reader's Digest Association v. Mahin*, 255 N.E.2d 458 (1970), cert. den. 399 U.S. 919. *Reader's Digest* involved many facts similar to the instant case. One such fact was that Reader's Digest Association published a monthly magazine exempt from taxation under the Illinois equivalent to California's periodical exemption. Despite this exemption, the court held that the presence of Reader's Digest Association's advertising solicitors within Illinois could be considered as one of two bases upon which it found sufficient nexus to uphold the taxation of its mail order sales of books and albums to Illinois residents in the face of constitutional objections. Thus, the court said:

> "Through its solicitors in the State of Illinois, plaintiff would be liable for use-tax collection on its magazine sales, absent its exemption. However, this exemption does not extend to other products, i.e., books and albums, sold to Illinois residents." 255 N.E. 2d 458, 460.

In light of the above, it is clear that section 6362 is irrelevant to the resolution of the instant controversy.

CONCLUSION

In light of the fairness concept underlying the Commerce Clause and Due Process Clause, it would be improper to do more than require that foreign retailers who are substantially exploiting a state's mail order market have some physical presence within that jurisdiction to become subject to a use tax collection requirement with regard to their mail order sales. To impose the further requirement that a relationship must exist between this physical presence and the mail order sales would needlessly sacrifice the states' taxing power and cripple its ability to protect its local retailers from an unfair competitive advantage thereby conferred upon foreign retailers who are free to sell ex tax.

Even were this not so, it is plain that the Society's California activities relate to the transaction taxed.

It is respectfully submitted that the judgment below be affirmed.

DATED: December 17, 1976.

Respectfully submitted,

EVELLE J. YOUNGER

EVELLE J. YOUNGER
Attorney General

ERNEST P. GOODMAN,
Assistant Attorney General

PHILIP M. PLANT
Deputy Attorney General

Attorneys for Appellee,
Board of Equalization of the
State of California

(Appendix Follows)

Appendix A

CALIFORNIA STATUTES INVOLVED

California Revenue and Taxation Code Section 6051:

For the privilege of selling tangible personal property at retail a tax is hereby imposed upon all retailers at the rate of 2½ percent of the gross receipts of any retailer from the sale of all tangible personal property sold at retail in this state on or after August 1, 1933, and to and including June 30, 1935, and at the rate of 3 percent thereafter, and at the rate of 2½ percent on and after July 1, 1943, and to and including June 30, 1949, and at the rate of 3 percent on and after July 1, 1949, and to and including July 31, 1967, and at the rate of 4 percent thereafter.

California Revenue and Taxation Code Section 6066:

Every person desiring to engage in or conduct business as a seller within this State shall file with the board an application for a permit for each place of business. Every application for a permit shall be made upon a form prescribed by the board and shall set forth the name under which the applicant transacts or intends to transact business, the location of his place or places of business, and such other information as the board may require. The application shall be signed by the owner if a natural person; in the case of an association or partnership, by a member or partner; in the case of a corporation, by an executive officer or some person specifically authorized by the corporation to sign the application, to which shall be attached the written evidence of his authority.

California Revenue and Taxation Code Section 6203:

Except as provided by Section 6292 and 6293 every retailer engaged in business in this state and making sales

of tangible personal property for storage, use, or other consumption in this state, not exempted under Chapters 3.5 or 4 of this part, shall, at the time of making the sales or, if the storage, use, or other consumption of the tangible personal property is not then taxable hereunder, at the time the storage, use, or other consumption becomes taxable, collect the tax from the purchaser and give to the purchaser a receipt therefor in the manner and form prescribed by the board.

As respects leases constituting sales of tangible personal property, the tax shall be collected from the lessee at the time amounts are paid by the lessee under the lease.

"Retailer engaged in business in this state" as used in this and the preceding section means and includes any of the following:

(a) Any retailer maintaining, occupying, or using, permanently or temporarily, directly or indirectly, or through a subsidiary, or agent, by whatever name called, an office, place of distribution, sales or sample room or place, warehouse or storage place or other place of business.

(b) Any retailer having any representative, agent, salesman, canvasser or solicitor operating in this state under the authority of the retailer or its subsidiary for the purpose of selling, delivering, or the taking of orders for any tangible personal property.

(c) As respects a lease, any retailer deriving rentals from a lease of tangible personal property situated in this state.

California Revenue and Taxation Code Section 6204:

The tax required to be collected by the retailer and any amount unreturned to the customer which is not tax but was collected from the customer under the representation by the retailer that it was tax constitutes debts owed by the retailer to this state.

California Revenue and Taxation Code Section 6362:

(a) There are exempted from the taxes imposed by this part, the gross receipts from the sale of, and the storage, use, or other consumption in this state, of tangible personal property which becomes an ingredient or component part of any newspaper or periodical regularly issued at average intervals not exceeding three months and any such newspaper or periodical.

(b) There are exempted from the taxes imposed by this part, the gross receipts from the sale of, and the storage, use, or other consumption in this state, of a photograph, whether or not produced to special order, when the possession, but not the title, of the photograph is transferred for the purpose of being reproduced one time only, in a newspaper regularly issued at the intervals set forth in subdivision (a) of this section.

California Revenue and Taxation Code Section 6401:

The storage, use, or other consumption in this state of property, the gross receipts from the sale of which are required to be included in the measure of the sales tax, is exempted from the use tax; provided, however, that this exemption does not extend to the possession of, or the exercise of any right or power over, tangible personal property by a lessee under a lease.